

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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MICHAEL D. BURCH and THE  
BANKRUPTCY ESTATE OF MICHAEL  
D. BURCH,

NO. CIV. S-04-0038 WBS GGH

Plaintiffs,

v.

MEMORANDUM AND ORDER  
RE: DEFENDANTS' EMERGENCY  
MOTION FOR RELIEF FROM ORDER

REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, LARRY VANDERHOEF,  
GREG WARZECKA, PAM GILL-  
FISHER, ROBERT FRANKS, and  
LAWRENCE SWANSON,

Defendants.

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Pursuant to Federal Rule of Civil Procedure 60(b),  
defendants have filed an emergency motion for relief from the  
court's July 22, 2005 order, requesting that they specifically be  
relieved from the portion of the order requiring them to produce  
within ten days from the date of the order the documents  
requested in plaintiffs' May 31, 2005 motion to compel.  
Defendants contend that they did not have an opportunity to be  
heard on the merits of the motion and that portions of the  
documents at issue are privileged.

1 I. Factual and Procedural Background

2 On February 16, 2005, this court granted the parties'  
3 stipulated request to modify the scheduling order in this case  
4 by, among other things, moving the deadline for the completion of  
5 discovery to April 11, 2005. (See February 16, 2005 Order at 4-  
6 5). On April 13, 2005 the court granted another stipulated  
7 request from the parties, extending "the deadline for completing  
8 depositions in this case . . . through May 30, 2005." (See April  
9 13, 2005 Order at 3) (emphasis added).

10 Because defendants requested and obtained several  
11 extensions for their final document production, they did not  
12 actually produce the final set of documents plaintiffs requested  
13 until May 13, 2005. (Declaration of Kristen Galles in Supp. of  
14 Pls.' Mot. Under Rule 56(f) (hereinafter "Galles Decl.") ¶ 8).  
15 Plaintiffs' counsel states that the final document production was  
16 deficient. (Id.).

17 After defendants' final production of documents, the  
18 parties conducted depositions in this case throughout the weeks  
19 of May 16 and May 23, 2005. (Id. ¶ 9). At the end of the second  
20 week, on May 27, 2005, plaintiffs' counsel held a final  
21 conference with defense counsel to try to resolve what she viewed  
22 as defendants' inadequate document production. She then filed a  
23 motion to compel on the next court day, which was May 31, 2005.  
24 (Id.). Plaintiff's counsel states that she could not file a  
25 motion to compel any sooner after receiving defendants' final  
26 production because she was engaged in depositions all day. She  
27 did, however, discuss with defense counsel her problems with the  
28 final production during breaks. (Id.). She further states that

1 defense counsel had promised her full production if she withheld  
2 filing a motion to compel so that defendants would have time to  
3 gather the requested documents. (Id.). Defendants deny this.  
4 (See Begley Decl. in Supp. of Defs.' Opp'n to Pls.' Mot. Under  
5 Rule 56(f) ("Begley Decl.") ¶¶ 13-14).

6 On or about June 22, 2005, defendants filed an ex parte  
7 application to deny plaintiff's motion to compel as untimely, or  
8 in the alternative, to continue the deadlines pertaining to  
9 plaintiff's motion to compel. On June 27, 2005, the assigned  
10 magistrate judge vacated plaintiffs' motion to compel on the  
11 ground that it was untimely because it was filed beyond the  
12 discovery deadline determined by this court's scheduling order.  
13 (See June 27, 2005 Order of Magistrate Judge at 1).

14 In the meantime, defendants filed two separate motions  
15 for summary judgment in this case pursuant to Federal Rule of  
16 Civil Procedure 56. In response, plaintiffs requested relief  
17 from the court pursuant to Federal Rule of Civil Procedure 56(f).  
18 Plaintiffs' counsel represented that she needed to obtain  
19 outstanding discovery necessary to adequately oppose defendants'  
20 motions, which discovery had been denied them by defendants.  
21 Defendants argued that plaintiffs' Rule 56(f) application was  
22 inexcusably untimely and argued that their summary judgment  
23 motions should have been heard and decided as scheduled without  
24 any substantive response from plaintiffs. After reviewing the  
25 parties' briefs and affidavits and considering the arguments  
26 therein, the court found that plaintiffs could not present facts  
27 essential to justify their opposition to defendants' motions for  
28 summary judgment. The court therefore denied defendants' motions

1 without prejudice subject to renewal after the completion of  
2 additional discovery ordered by the court, made scheduling  
3 changes, and granted plaintiffs' motion to compel which was at  
4 the heart of plaintiffs' Rule 56(f) application. (See July 27,  
5 2005 Order at 2-3).

6 II. Discussion

7 A. Legal Standard

8 Federal Rule of Civil Procedure 60(b) authorizes the  
9 court to "relieve a party . . . from a final judgment or order . .  
10 . for [among other things] mistake [or] . . . any . . . reason  
11 justifying relief from the operation of the judgment." Fed. R.  
12 Civ. P. 60(b). "Rule 60(b) does not particularize the factors  
13 that justify relief, but . . . it provides courts with authority  
14 'adequate to enable them to vacate judgments whenever such action  
15 is appropriate to accomplish justice.'" Lijeberg v. Health Servs.  
16 Acquistion Corp., 486 U.S. 847 (1988) (citing Klapprott v. United  
17 States, 335 U.S. 601, 614-15 (1949)). However, Rule 60(b) relief  
18 should only be applied in "extraordinary circumstances." Id.

19 B. The Court Was Justified in Ruling on Plaintiffs' Motion  
20 to Compel Though Some Modification to the Prior Order  
21 is Appropriate

22 Defendants contend that plaintiffs' Rule 56(f)  
23 application was untimely because the discovery deadline and  
24 deadline for filing the motion to compel on which the Rule 56(f)  
25 application relied had expired, and because plaintiffs had not  
26 shown "good cause" for their late filing. Thus, in defendants'  
27 view, it was too late for plaintiffs to file a motion to compel  
28 in order to obtain discovery with which to prepare an opposition

1 to defendants' motions for summary judgment. Plaintiffs  
2 contended that any untimeliness on their part was excusable.

3 Whether plaintiffs had a right to the discovery  
4 requested in their motion to compel turned, in part, on whether  
5 the motion was timely. See, e.g., Goodworth Holdings, Inc. v.  
6 Suh, 239 F. Supp. 2d 947, 966 (N.D. Cal. 2002) (denying motion to  
7 compel as untimely). This is because Rule 56(f) applications are  
8 generally disfavored after the close of discovery because the  
9 party seeking delay has already had an opportunity to obtain  
10 discovery. See Conkle v. Jeong, 73 F.3d 909 (9th Cir. 1995);  
11 Allstate Ins. Co. v. Gilbert, 852 F.2d 449 (9th Cir. 1988).  
12 However, even an untimely motion to compel may be granted where  
13 production of discovery has been inadequate. Jorgensen v.  
14 Cassiday, 320 F.3d 906, 913 (9th Cir. 2003). A relaxation of the  
15 court's scheduling order may also be in order where a party  
16 making a Rule 56(f) application submits evidence demonstrating  
17 that he filed an untimely motion to compel after relying on  
18 representations by the opposing party that requested discovery  
19 would be forthcoming. See M2 Software, Inc. v. M2 Comm., L.L.C.,  
20 217 F.R.D. 499 (C.D. Cal. 2003). Further, a district court may  
21 allow an untimely motion to compel to be heard even where the  
22 court finds no good cause for extension if the party requesting  
23 discovery acted reasonably and the requests are highly relevant,  
24 Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004), or where the  
25 moving party would otherwise be "significantly handicapped."  
26 Allen v. G.D. Searle & Co., 1988 U.S. Dist. LEXIS 13116 \*3-4 (D.  
27 Or. 1988).

28 Plaintiffs filed their motion to compel on May 31,

1 2005. (See Pls.' Mot. to Compel). However, the February 16,  
2 2005 modification to the scheduling order set the deadline for  
3 the completion of discovery on April 11, 2005. (February 16,  
4 2005 Order at 4-5). This deadline was also the deadline for  
5 filing a motion to compel, because, as the original scheduling  
6 order made clear, the discovery deadline was also to be the  
7 deadline to have all motions to compel "heard" and "any resulting  
8 orders [therefrom] obeyed." (See March 3, 2004 Status (Pretrial  
9 Scheduling) Order at 3). The April 13, 2005 order granting the  
10 parties' stipulated request to extend the deadline for completing  
11 depositions did not change the general discovery deadline or the  
12 deadline for motions to compel production of other nondeposition  
13 discovery. (See April 13, 2005 Order at 3). Nondeposition  
14 discovery was what plaintiffs requested. (See Pls.' Proposed  
15 Order Re: Pls.' Mot. Under Rule 56(f) at 2).<sup>1</sup> Therefore,  
16 plaintiffs' motion to compel was untimely.

17           However, plaintiffs' tardiness in filing their motion  
18 to compel was excusable under the circumstances. Plaintiffs'  
19 counsel stated in her declaration that she relied on defense  
20 counsel's representations that all requested documents would be  
21 produced to her satisfaction if she refrained from filing a  
22 motion to compel. (See Galles Decl. ¶ 9).<sup>2</sup> By the time she  
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24           <sup>1</sup> Plaintiffs only requested further deposition discovery  
25 to the extent it became necessary to clarify any issues raised by  
26 the document production they requested. (See Pls.' Mot. Under  
Rule 56(f) at 4).

27           <sup>2</sup> Defendants denied that such a representation was ever  
28 made. (See Begley Decl. ¶¶ 13-14). However, like the court in  
M2 Software, 217 F.R.D. 499, this court chose to focus on the  
sufficiency of plaintiffs' evidence regarding the reason for

1 received defendants' final production on May 13, 2005 and  
2 realized it was, in her opinion, deficient, she was already  
3 facing two weeks' worth of depositions that had to be completed  
4 by May 30, 2005. (Id. ¶¶ 8-9). Though plaintiffs' counsel  
5 discussed the problems with defendants' production during breaks  
6 in the depositions, she was not able to file a motion to compel  
7 until after she held a final conference with defense counsel  
8 regarding the issue on May 27, 2005, after the depositions ended.  
9 (Id. ¶ 9). She then filed a motion to compel on May 31, 2005,  
10 the next court day after her final conference with defendants.  
11 (Id.). Because plaintiffs' counsel is a solo practitioner, she  
12 could not have been expected to respond to defendants' allegedly  
13 inadequate production any sooner. (See Pls.' Mot. Under Rule  
14 56(f) Ex. 4 (Galles Decl. in Supp. of Pls.' Emergency Mot. to  
15 Change Hearing Date and Modify Scheduling Order) ¶ 1). She also  
16 credibly represented that the discovery requested was critical to  
17 her response to defendants' motions. (See Galles Decl. ¶¶ 14-  
18 16) (noting that plaintiffs needed production of documents to  
19 demonstrate, among other things, that defendant Vanderhoef was,  
20 contrary to his claims, involved in the termination of Mr. Burch;  
21 that defendants' claim that they decided to terminate Mr. Burch  
22 before he engaged in protected activity is false; and that the  
23 reasons defendants gave for terminating Mr. Burch are false).

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24  
25 their untimely filing. Whatever misunderstanding the parties may  
26 have had regarding document production and whether plaintiffs'  
27 had to file a motion to compel to obtain requested discovery,  
28 plaintiffs' counsel's declaration sufficiently demonstrated that  
she had reason to delay filing a motion to compel. See id. at  
500 (looking to movant's evidence to demonstrate that movant  
relied on representations that document production would be  
forthcoming in delaying to file motion to compel).

1           Because plaintiffs' delay in filing their motion to  
2 compel was excusable and because the motion covered discovery  
3 relevant to plaintiffs' Rule 56(f) application, the court  
4 considered and ruled on both the motion to compel and the Rule  
5 56(f) application.

6           Defendants contend that it was erroneous and unfair for  
7 the court to rule on the motion to compel without giving  
8 defendants an opportunity to make substantive objections to the  
9 motion, especially where defendants had claimed that some of the  
10 documents at issue were privileged. However, the court  
11 determined that defendants waived any right to object to  
12 plaintiffs' motion to compel to the extent they misled plaintiffs  
13 into believing that the requested documents would be produced.  
14 See Brandt v. Vulcan, Inc., 30 F.3d 752 n.9 (7th Cir.  
15 1994) (acknowledging "that courts have inherent authority to  
16 sanction discovery abuses"); Fjelstad v. Am. Honda Motor Co., 762  
17 F.2d 1334, 1338 (9th Cir. 1985) (noting that "district courts may  
18 rely on their inherent powers in penalizing some forms of  
19 discovery abuse"). Nevertheless, upon reconsideration, the court  
20 acknowledges that defendants' representations that they would  
21 produce all the requested discovery should not reasonably be  
22 interpreted to mean that they would produce allegedly privileged  
23 documents. (See Galles Decl. ¶ 14). Therefore, the court's  
24 prior order will be modified to the extent it encompassed the  
25 production of documents alleged to be privileged.

26           Plaintiffs have, however, raised questions regarding  
27 the validity of some of defendants' privilege claims. (See  
28 Galles Decl. ¶ 15). The court does not wish to disregard



1 plaintiffs' concerns regarding defendants' privilege claims. Nor  
2 does it mean to impute any disingenuousness to defendants with  
3 regard to their privilege claims. However, to allay plaintiffs'  
4 concerns that defendants' privilege claims are overbroad or  
5 unmeritorious, the court will require defendants to file with the  
6 court under seal all allegedly privileged documents requested by  
7 plaintiffs, subject only to the court's review. This requirement  
8 will encourage defendants to scrutinize their privilege claims.

9 IT IS THEREFORE ORDERED that:

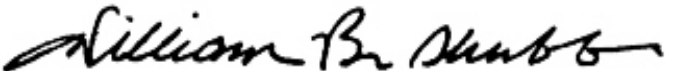
10 (1) defendants' motion for relief from the court's July  
11 22, 2005 order be, and the same hereby is, DENIED IN PART AND  
12 GRANTED IN PART;

13 (2) defendants shall produce all nonprivileged  
14 documents requested in plaintiffs' May 31, 2005 motion to compel  
15 by August 3, 2005.

16 (3) on or before August 10, 2005, defendants shall file  
17 with the court under seal copies of any documents requested in  
18 plaintiffs' May 31, 2005 motion to compel which defendants claim  
19 to be privileged; and

20 (4) except as herein modified, all other provisions of  
21 this court's order of July 22, 2005 remain in full force and  
22 effect.

23 DATED: July 29, 2005

24  
25   
26 WILLIAM B. SHUBB  
27 UNITED STATES DISTRICT JUDGE  
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